

EUGENE A. WHITMILL

IBLA 77-576

Decided March 2, 1978

Appeal from decision of Alaska State Office, Bureau of Land Management, rejecting application to bring a private contest against homestead entry AA 8407.

Affirmed.

1. Contests and Protests—Homesteads (Ordinary): Contests—Rules of Practice: Private Contests

A private contest complaint which does not set out in clear and concise language a statement of the facts constituting the grounds of contest is properly dismissed.

APPEARANCES: Eugene A. Whitmill, pro se.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Homestead entry AA 8407 was allowed to Albert A. Howe on October 6, 1975. Howe was granted a 6-month extension to establish residence on the entry. The case file has a communication from Howe, received October 12, 1976, by the Alaska State Office, Bureau of Land Management (BLM), in which Howe states that he had established residence on the homestead entry as of October 5, 1976. A subsequent communication from Howe, received by BLM on November 8, 1976, stated that he had built a 16- by 16-foot cabin with ancillary outbuildings on the entry, but because of bad weather he would be taking a leave of absence, not to exceed 5 months. The communication does not indicate the date of commencement of the 5-month period, nor that BLM took any action on the notice. The case file has a report of field examination dated February 7, 1977, in which it is stated that Howe was required to be back in residence on the homestead entry by April 1, 1977, after using his 5-month leave of absence. There is no explanation why April 1, 1977, was determined to be the end of the 5-month leave of absence announced in Howe's communication received November 8, 1976. A report of an interview with one Fred Reynolds,

dated March 4, 1977, states that Howe or his representative had removed propane bottles and furnishings from the cabin on the homestead entry, an action interpreted by BLM as indicative that Howe did not intend to proceed further in proving up on his homestead entry. The report reiterates that Howe must resume residence on or before April 1, 1977. In any event, the file does not contain any notice from Howe that he had terminated his leave of absence from the entry, as required by 43 U.S.C. § 164 (1970).

On April 4, 1977, Eugene A. Whitmill filed a complaint with BLM, seeking to initiate a private contest against homestead entry AA 8407, alleging that Howe "failed to meet the minimum residence requirements and Laws" by not being present and residing on the entry when the allowed extension expired April 1, 1977. By decision dated August 8, 1977, BLM dismissed the contest complaint for the reason that it did not meet all the requirements of the regulations, 43 CFR 4.450-4(a)(4) and 4.450-4(c).

Whitmill appealed. Several procedural deficiencies are noted in the appeal. The BLM decision was served on Whitmill on August 10, 1977. His appeal was received by BLM on September 15, 1977, within the grace period. 43 CFR 4.401. This delay in filing may be waived as the appeal had been sent directly to the Board of Land Appeals, contrary to the instructions in the BLM decision, and then remailed by this office to BLM. 43 CFR 4.411(b). Also it is noted that there is no indication that the appeal was served on Howe, as required by the BLM decision. Such failure to serve the appeal on the adverse party and to file proof of such service with this Board within the time allowed by regulation subjects the appeal to summary dismissal. 43 CFR 4.402. Nevertheless, we have considered the appeal on its merits and affirm the dismissal of the contest complaint.

Regulation 43 CFR 4.450-4(a)(4) requires a statement in clear and concise language of the facts constituting the grounds of contest; 43 CFR 4.450-4(c) states that all allegations of fact in the complaint which are not matters of official record or capable of being judicially noticed and which, if proven, would invalidate the adverse interest must be corroborated under oath by the statements of witnesses.

The BLM decision stated it was not clear whether the complaint was charging that Howe had not established residence within the time limits prescribed in 43 CFR 2567.5(a)(1), or that Howe had not complied with the length of residence set forth in 43 CFR 2567.(a)(2).

43 CFR 2567.5(a)(1) requires the entryman to establish residence upon his homestead entry within 6 months after the date of entry, but allows an extension of 6 months upon application where climatic reasons, sickness or other unavoidable cause prevents the

establishment of residence. Howe's entry was allowed October 5, 1975; he applied for and was granted an extension until October 6, 1976, to establish his residence upon the entry. The record includes a statement from Howe that he did establish residence upon the entry by October 5, 1976. The charge cannot be read as a challenge to that statement. After establishment of residence, Howe took leave of absence, as provided by 43 CFR 2567.5(a)(2). The terminal date of the 5-month period was April 8, 1977, after the date Whitmill filed his proposed contest complaint, so again there was no basis for the charge that residence had not been timely resumed on the entry.

43 CFR 2567.5(a)(2) also provides that the entryman must reside on his homestead entry for at least 3 years. As this entry was allowed in October 1975, the complaint filed in April 1977 was premature, if charging that Howe had not satisfied the total residence requirement. An allegation in a private contest complaint that a homestead entryman did not meet certain requirements as "required by law" states merely a conclusion and without supporting facts is not a sufficient charge under the Department's regulations governing private contests. Oxford v. McCoy, A-30603 (October 6, 1966).

On appeal, Whitmill argues that Howe was required to establish residence on the entry by April 1, 1977, a date which derives only from the field reports in the case file, not from any official decision. The record indicates that Howe stated that he had established residence on the entry by October 5, 1976, and in November 1976, had commenced a leave of absence.

[1] Although the regulations preclude a private contest from relying only upon facts reflected in the BLM records, Stephen v. Moon, A-30350 (August 19, 1965), a memorandum to the case file containing an opinion of the writer that conditions on the homestead entry indicate to him that the entryman does not intend to proceed further towards finalizing [the] claim is not such a fact. Examination of the case file of the Howe homestead entry as of April 4, 1977, does not disclose any facts which might preclude a properly drawn private contest complaint.

The charge that a contestee "failed to meet the minimum residence requirements" by not being present and residing on the entry on April 1, 1977, is not a viable charge unless that date has legal significance insofar as the viability of the entry is concerned. A complaint containing only that charge is properly dismissed.

We agree that the charge in the complaint by Whitmill does not meet the requirements of 43 CFR 4.450. For this reason, BLM was correct in dismissing the contest complaint.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Douglas E. Henriques  
Administrative Judge

We concur.

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Newton Frishberg  
Chief Administrative Judge

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Frederick Fishman  
Administrative Judge

